Jamin Trading Sdn Bhd & Anor v Shell Malaysia Trading Sdn Bhd

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO (MT-1) 22–887 OF 2006
VERNON ONG J
25 JUNE 2010

Contract — Terms — Option clause — Clause in contract granted second plaintiff first option to operate petrol station — Option exercised in favour of first plaintiff — Contract fully performed — Whether obligation to grant first option continued indefinitely — Whether first plaintiff breached agreement to operate station — Whether termination of agreement by defendant lawful — Whether first plaintiff entitled to legitimate expectation of renewal of agreement to continue operating station — Whether doctrine of legitimate expectation applied to private contracts

Pursuant to a sale and purchase agreement ('SPA'), the second plaintiff sold a piece of land to the defendant on which a petrol filling and service station was erected. The agreement gave the second plaintiff first option to operate the station but at the second plaintiff's request its associate company, the first plaintiff, was appointed as the operator. In the course of their business relationship the first plaintiff and the defendant entered into two successive five-year *penjual* licence agreements. Before the second *penjual* licence agreement (the 'second agreement') expired the defendant issued the first plaintiff a show cause letter, alleging it had breached the second agreement, and proceeded to terminate the agreement. The first plaintiff refused to hand over vacant possession of the station to the defendant. The defendant subsequently acquired same through court proceedings. The show cause letter charged that the first plaintiff had breached cl 31.1 of the second agreement by changing its business constitution without the defendant's prior written consent, to wit, that a director of the first plaintiff had sold 100,000 of his shares in the company and resigned as director. The plaintiffs denied shares in the first plaintiff were sold and said the termination was bad in law; that they had a legitimate expectation the second agreement would be renewed to maintain the first plaintiff as operator of the station so long as it obtained the Petroleum Development Act ('PDA') Licence to operate and that the defendant's obligation under the SPA to offer the second plaintiff first choice to operate the station was a continuing one. The defendant counter-claimed for damages in trespass caused by the first plaintiff's refusal to hand over vacant possession of the station and also claimed aggravated damages for loss of business and reputation. It denied it had breached the SPA as the obligations of the parties

thereunder had been fully performed and the contract had come to an end. The defendant also said the second agreement was lawfully terminated.

Held, dismissing the plaintiffs' claim with costs, and allowing the defendants' counterclaim in prayers (b), (c), (d) and (e) with costs:

(1) The respective obligations of the parties to the SPA had been fully performed when the purchase price was settled, the title in the land was transferred to the defendant and the first plaintiff was appointed to operate the petrol station (see para 13).

(2) Nothing in cl 13 of the SPA intimated that the defendant's obligation to offer the second plaintiff first choice to operate the petrol station was a continuing offer or that the option was indefinite. The defendant's obligations under the SPA were performed when it appointed the first plaintiff as operator of the station. Thereafter the obligation no longer subsisted. The question whether the defendant breached that obligation was a non-issue (see paras 18 & 19).

(3) The allegation in the defendant's show cause letter that the first plaintiff's constitution had changed due to its director's disposal of 100,000 shares was unfounded. The disposal of the shares was in Mega Equity Sdn Bhd ('MESB') which did not tantamount to disposal of shares of the first plaintiff. Only the shareholding of MESB changed with the disposal of the shares. There was no change to the shareholding of the first plaintiff as MESB remained as its shareholder (see para 32).

(4) The resignation of the first plaintiff's director without the defendant's prior written consent thereto was a breach of cl 31.1 of the second agreement which entitled the defendant to terminate the agreement (see paras 33 & 35).

(5) There was no basis upon which the first plaintiff could claim legitimate expectation that the defendant would renew the second agreement to continue the first plaintiff as operator of the petrol station so long as the first plaintiff renewed the PDA licence. None of the cases cited by the plaintiffs showed that the doctrine of legitimate expectation applied to a party's rights under a private contract (see para 41).

[Bahasa Malaysia summary

Berikutan satu perjanjian jual beli ('PJB'), plaintif kedua telah menjual sebidang tanah kepada defendan yang mana pengisian dan perkhidmatan petrol dibangunkan. Perjanjian memberikan defendan kedua pilihan pertama untuk menguruskan stesen tetapi dengan permintaan plaintif kedua, syarikat bersekutu, plaintif pertama, dilantik sebagai operator. Semasa dalam hubungan perniagaan, plaintif pertama dan defendan memasuki dua perjanjian lesen penjual lima tahun. Sebelum perjanjian lesen penjual

('perjanjian kedua') luput, defendan telah mengeluarkan satu surat tunjuk sebab kepada plaintif pertama, dengan mendakwa bahawa dia telah melanggari perjanjian kedua, dan meneruskan dengan menamatkan perjanjian. Plaintif pertama enggan untuk menyerahkan milikan kosong ke atas stesen kepada defendan. Defendan seterusnya mengambil tindakan melalui prosiding mahkamah. Surat tunjuk sebab mendakwa bahawa plaintif pertama telah melanggari klausa 31.1 perjanjian kedua dengan menukar perlembagaan perniagaan tanpa kebenaran bertulis defendan, iaitu bahawa pengarah kepada plaintif pertama telah menjual 100,000 syer miliknya dalam syarikat dan meletakkan jawatan sebagai pengarah. Plaintif-plaintif menafikan syer-syer plaintif pertama telah dijual dan bahawa penamatan itu adalah tidak sah di sisi undang-undang; bahawa mereka mempunyai harapan yang sah bahawa penjanjian akan diperbaharui untuk mengekalkan plaintif pertama sebagai operator asalkan dia mendapatkan lesen Akta Kemaju Petroleum ('AKP') dan bahawa tanggungjawab defendan di bawah PJG untuk memberi plaintif kedua pilihan utama untuk terus mengoperasikan stesen tersebut secara berterusan. Defendan menuntut balas bagi ganti rugi pencerobohan yang disebabkan oleh keengganan plaintif pertama untuk menyerahkan milikan kosong stesen dan juga menuntut ganti rugi tambahan bagi kehilangan perniagaan dan reputasi. Dia menafikan telah melanggari PJB sebagai tanggungjawab-tanggungjawab pihak-pihak yang mana telah dijalankan secara penuh dan kontrak telah pun tamat. Defendan juga mendakwa bahawa perjanjian kedua telah ditamatkan secara sah.

Diputuskan, menolak tuntutan plaintiff dengan kos dan, membenarkan tuntutan balas defendan dalam permohonan (b), (c), (d) dan (e) dengan kos:

(1) Obligasi-obligasi pihak-pihak di bawah PJB telah dijalankan secara penuh apabila harga belian telah diselesaikan, hakmilik ke atas tanah berpindah kepada defendan dan plaintif pertama telah dilantik untuk menguruskan stesen petrol (lihat perenggan 13)

(2) Tiada dalam klausa 13 PJB yang menyatakan tanggungjawab defendan untuk menawarkan plaintif kedua pilihan pertama untuk mengoperasikan stesen petrol adalah tawaran berterusan atau pilihan tersebut adalah tidak jelas. Tanggungjawab-tanggungjawab defendan di bawah PJB telah dilaksanakan apabila dia melantik plaintif pertama sebagai operator stesen. Dengan itu, tanggungjawab tiada lagi wujud. Persoalan sama ada defendan telah melanggari perjanjian bukanlah isu (lihat perenggan 18 & 19)

(3) Dakwaan dalam surat tunjuk sebab defendan bahawa perlembagaan plaintif pertama telah bertukar kerana pelupusan syer sebanyak 100,000 oleh pengarahnya adalah tidak berasas. Pelupusan syer-syer adalah di dalam Mega Equity ('MESB') yang tidak membawa kepada pelupusan syer-syer plaintif pertama. Hanya pemegangan syer MESB bertukar

dengan pelupusan syer-syer. Tiada pertukaran bagi pemegangan syer plaintif pertama kerana MESB kekal sebagai pemegang syer.

(4) Peletakan jawatan plaintif pertama sebagai pengarah tanpa kebenaran bertulis defendan adalah dengan itu, pelanggaran kepada klausa 31.1 perjanjian kedua yang memberi hak kepada defendan untuk menamatkan perjanjian (lihat perenggan 33 & 35)

(5) Tiada asas yang mana plaintif pertama boleh menuntut harapan yang sah bahawa defendan akan memperbaharui perjanjian kedua untuk menyambung plaintif pertama sebagai operator stesen petrol selagi plaintif pertama memperbaharui lesen AKP. Tiada kes-kes yang dinyatakan plaintif-plaintif menunjukkan bahawa doktrin harapan yang sah terpakai kepada hak pihak-pihak di bawah kontrak peribadi (lihat perenggan 41).]

Notes

For a case on option clause, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) para 5448.

Cases referred to

Attorney General of Belize v Belize Telecom Limited [2009] UKPC 10 (refd)
Baldev Singh v Mahima Singh & Ors [1974] 2 MLJ 206 (refd)
Bank of Credit and Commerce International SA v Munawar Ali [2001] 2 WLR 735 (refd)
Berjaya Times Square Sdn Bhd v M-Concept Sdn Bhd [2010] 1 CLJ 269, FC (refd)
Chooi Siew Cheong v Lucky Height Development Sdn Bhd & Anor [1995] 1 MLJ 513; [1995] 2 CLJ 11, FC (refd)
Coghlan v SH Lock (Australia) Ltd (1987) 3 BCC 183, PC (refd)
Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, HL (refd)
Ebrahimi v Westbourne Galleries [1973] AC 360, HL (refd)
Gek Lau Choon Theatrical Company v Hu Kiang Yan [1937] MLJ 25 (refd)
Investors Compensation Scheme Ltd v West Bromwich Building Society [1998] 1 All ER 98, HL (refd)
Keng Huat Film Co Sdn Bhd v Makhanlall (Properties) Pte Ltd [1984] 1 MLJ 243; [1983] 2 CLJ 187; [1983] CLJ (Rep) 186, FC (refd)
Latham v Credit Suisse First Boston [2000] 2 SLR 693, CA (refd)
Law Pang Ching & Ors v Tawau Municipal Council [2009] 3 MLJ 452; [2010] 2 CLJ 821, CA (refd)
Loh Wai Lian v SEA Housing Corporation Sdn Bhd [1987] 2 MLJ 1; [1987] 1 LNS 37, PC (refd)
Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan tanggungan [1999] 3 MLJ 1; [1999] 3 CLJ 65, FC (refd)

Law Pang Ching & Ors v Tawau Municipal Council [2009] 3 MLJ 452; [2010] 2 CLJ 821, CA (refd)
Prenn v Simmonds [1971] 3 All ER 237, HL (refd)
R v Metropolitan Borough Council [1976] 3 All ER 452 (refd)
Saul Defendant Harrison & Sons plc [1995] 1 BCLC 14 (refd)
Shore v Wilson (1839, 1842) 9 Cl & Fin 355 (refd)
Sim Yong Kim v Evenstar Investments Pte Ltd (2006) 3 SLR(R) 827; [2006] SGCA 23, CA (refd)
Soo Boon Kooi @ Saw Boon Kooy (deceased)) & Ors [2008] 1 MLJ 27, CA (refd)
Sri Alam Sdn Bhd v Newacres Sdn Bhd [1997] 1 MLJ 297; [1994] 1 CLJ 302, CA (refd)
Tuan Haji Ismail v Leong Hup Holdings Bhd and other appeals [1996] 1 MLJ 661; [1996] 1 CLJ 393, CA (refd)
Visvanathan Perumal & 2 Ors v Mona Industries Malaysia Sdn Bhd & Anor [2004] 1 LNS 35, HC (refd)

Legislation referred to

Companies Act 1965 ss 128, 181
Evidence Act 1950 s 92, 92(b), (c)

Balan Nair Thamodaran (Thomas Philip) for the plaintiff.
Wong Hin Loong (Azman Davidson & Co) for the defendant.

Vernon Ong J:

[1] The first plaintiff was granted a licence by the defendant to operate a petrol station. The plaintiffs contend that the defendant's termination of the licence is mala fide and bad in law. The defendant's counterclaim is for damages for trespass owing to the first plaintiff's refusal to hand over vacant possession of the petrol station.

BRIEF ACCOUNT OF THE FACTS

[2] By a sale and purchase agreement dated 20 September 1984 ('the SPA') the second plaintiff sold to the defendant a piece of land. The defendant agreed to offer to the second plaintiff the first choice for operatorship of the petrol and service station to be constructed on the land. On 23 January 1985 the defendant was registered as the owner of the land.

[3] On 11 September 1985 at the second plaintiff's request the defendant agreed to appoint the first plaintiff to operate the petrol station to be constructed on the land. The first plaintiff operated the petrol station from 1986 until 1995. On 1 January 1996 the first plaintiff and the defendant entered into a shell retailer licence agreement ('first agreement') for a five year

term. Subsequently on 11 November 2001 the first plaintiff and the defendant entered into a shell retailer licence agreement ('second agreement') for the period commencing from 1 December 2001 to 10 October 2006.

[4] On 8 August 2006 the defendant issued a show cause letter ('the show cause letter') to the first plaintiff. The defendant informed the first plaintiff that they have changed their business constitution without the defendant's prior written consent, viz, (i) a previous director one En Zaharey bin Jusoh has sold 100,000 of his shares, and (ii) Zaharey has resigned his directorship in March 2005. Notwithstanding the first plaintiff's reply dated 14 August 2006 the defendant terminated the second agreement in a letter dated 27 October 2006 ('the termination letter'). The first plaintiff was also asked to hand over vacant possession of the petrol station to the defendant by 28 November 2006. The first plaintiff did not hand over vacant possession of the petrol station to the defendant. On 15 April 2008 the defendant obtained a mandatory injunction which enabled the defendant to take vacant possession of the petrol station.

THE PLAINTIFFS' CASE

[5] The second agreement was a mere formality and the initial terms of the SPA were in force in that the first plaintiff will continue to be given the right to operate the petrol station subject to the condition that the first plaintiff obtains the PDA licence.

[6] The defendant terminated the second agreement for no apparent and justified reason. The first plaintiff had a legitimate expectation that the second agreement will be renewed and the first plaintiff continue to be appointed as the operator of the petrol station. The defendant is also estopped from terminating and or refusing to proceed with the second agreement.

THE DEFENDANT'S DEFENCE AND COUNTERCLAIM

[7] The issue of the defendant breaching the terms of the sale and purchase agreement does not arise. The contractual relationship between the second plaintiff and the defendant has already ended since the sale was successfully completed and the defendant is now the registered owner of the land. The second agreement was lawfully terminated either under cll 2.3, 22.1, 20.3.1 or 20.3.7.

[8] The first plaintiff remained in occupation of the petrol station as a trespasser before the mandatory injunction was granted. Consequently, the defendant has suffered damages because (i) it has been deprived of its rights of possession of the petrol station, (ii) it has been deprived of its right to nominate a new retailer to operate the petrol station, and (iii) it has incurred loss of profits

from the sale of petroleum products. The defendant is also claiming aggravated damages for loss of business and reputation.

FINDINGS OF THE COURT

[9] During the trial the court heard the evidence of En Zahery bin Jusoh (PW1) a director of the first plaintiff company and Mr Andrew Ooi Soon Hock (DW1) the health, safety, security and environmental manager for the defendant company. In essence the plaintiffs' claim is premised on the second agreement being wrongly terminated by the defendant and on the defendant's subsisting obligation under the SPA to appoint the first plaintiff as the operator of the petrol station. By consent of both parties, the issues to be tried were agreed as follows:

(a) Whether the defendant's obligation under the SPA to offer the second plaintiff the first choice for operatorship of the petrol filling station and service station is still binding on the defendant? If so, whether the defendant breached the said obligation.

(b) Whether the first plaintiff breached the second agreement? If so, whether the termination of the second agreement by the defendant is valid in law.

(c) Whether the first and second plaintiffs have a legitimate expectation that the defendant will renew the operation of the petrol station so long as the PDA licence is renewed by the first plaintiff?

Whether the defendant's obligation under the SPA to offer the second plaintiff the first choice for operatorship of the petrol filling station and service station is still binding on the defendant? If so, whether the defendant breached the said obligation

[10] PW1 said that in 1984 the defendant and the second plaintiff entered into negotiations for the purchase of the land for the purposes of constructing a petrol station. PW1 and one Goh Teong Hoe represented the second plaintiff while the defendant was represented by one Khoo Teck Chooi. According to PW1 it was agreed that in consideration of the sale of the land the second plaintiff or its nominee will be given the operatorship of the petrol station so long as the PDA licence and other approvals are obtained. The terms of the agreement were subsequently reduced into writing under cl 13 of the SPA on 20 September 1984. On 5 September 1985 the second plaintiff wrote to the defendant asking for its associate company the first plaintiff to be appointed as the operator of the petrol station. On 11 September 1985 the defendant replied agreeing to the appointment of the first plaintiff.

[11] Learned counsel for the plaintiffs submitted that PW1's evidence with regards to the terms of the negotiation prior to the execution of the SPA is

consistent with the terms of the SPA, in particular cl 13. The defendant did not adduce any evidence to challenge or contradict PW1's evidence. The defendant's obligations to give the second plaintiff the first choice of operatorship are a continuing obligation and it is still binding on the defendant. The said obligation does not come to an end by the mere reason that the sale of the land has been completed. After having conducted itself in accordance to the SPA, the defendant cannot now claim not to be bound by the SPA and is estopped from doing so.

[12] On the other hand the defendant contends that as cl 13 is free from any ambiguity, it should be construed according to its plain and ordinary meaning (*Shore v Wilson* (1839, 1842) 9 Cl & Fin 355, 450, 452). Further, PW1 agreed in cross-examination that all the terms in the SPA had already been fulfilled by both parties and the title in the land has since been transferred to the defendant. There is nothing in cl 13 to grant to the second plaintiff the perpetual right to nominate any new operator to run the petrol station in the event the second agreement is terminated or lapsed. Since the defendant and the second plaintiff have performed all their obligations under the SPA. All has been done on both sides that could be required to be done under the contract (*Sinnadurai on The Law of Contracts* (3rd Ed), Vol 1 at p 600). The issue of the defendant breaching its obligation under the SPA does not arise since the SPA has been discharged by performance.

[13] In this regard it is necessary to ascertain: (i) whether the defendant and the second plaintiff have fully performed their respective obligations under the SPA; and (ii) whether there is a continuing obligation on the defendant to appoint the second plaintiff or its nominee to operate the petrol station. On the first question, the court finds that the respective obligations of the parties therein have been fully performed when the purchase price was settled, the title in the land was transferred to the defendant and after the first plaintiff was appointed by the defendant to operate the petrol station.

[14] The second question relating to the continuing obligation hinges on whether PW1's evidence is admissible in the light of the SPA. As a general rule, once a document has been produced to prove its contents, as has been done in the present case, evidence of any oral agreement to contradict, vary, add to or subtract from its terms are inadmissible. There are, however, a number of exceptions to this general rule. The exceptions to the general rule are set out in the six provisos to s 92 of the Evidence Act 1950. Section 92 of the Evidence Act is as follows:

92 Exclusion of evidence of oral agreement

When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 91, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms:

Provided that —

(a) Any fact may be proved which would invalidate any document or which would entitle any person to any decree or order relating thereto, such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, the fact that it is wrongly dated, want or failure of consideration, or mistake in fact or law;

(b) The existence of any separate oral agreement, as to any matter on which a document is silent and which is not inconsistent its terms, may be proved, and in considering whether or not this proviso applies, the court shall have regard to the degree of formality of the document;

(c) The existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved;

(d) The existence of any distinct subsequent oral agreement, to rescind or modify any such contract, grant or disposition of property, may be proved except in cases in which the contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents;

(e) Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description may be proved if the annexing of any such incident would not be repugnant to or inconsistent with the express terms of the contract; and

(f) Any fact may be proved which shows in what manner the language of a document is related to existing facts.

[15] In this case PW1's evidence are clearly intended to vary or add to the terms of cl 13 which falls under provisos (b) or (c) above. In the first instance, the plaintiffs' allegations do not touch on matters which the SPA is silent and which is not inconsistent with its terms. The SPA is a comprehensive agreement embodying all the usual terms and conditions of a sale and purchase transaction for land. Further cl 13 already provided for the appointment of the second plaintiff as the petrol station operator. In this respect, the court has also regarded the degree of formality of the SPA. The SPA is a formal written agreement. It is a five page document containing three paragraphs of recitals and 18 clauses of terms and conditions. The more formal the written document is, the more suspicious the court must be as to the existence of a collateral contract, and if the contract is informal less suspicion attaches to the attempt to

set up a collateral contract (see *Gek Lau Choon Theatrical Company v Hu Kiang Yan* [1937] MLJ 25 (HC)). On the totality of the evidence, the plaintiffs' allegation is not and cannot be said to be a separate oral agreement as to which the SPA is silent. PW1's evidence in support of this allegation of a separate oral agreement is of no avail. Secondly, the scope of proviso (c) in s 92 is clearly confined to evidence of a condition precedent to a written contract. A condition precedent to an agreement is one where the parties have agreed that the written contract does not take effect until the fulfilment of a certain condition (see *Latham v Credit Suisse First Boston* [2000] 2 SLR 693 (CA)). It is pertinent to point out that in cross-examination PW1 agreed that all the terms and conditions of the agreement reached between the second plaintiff and the defendant are contained in the SPA. In this instance the SPA has already been fully performed. There was no condition precedent to its performance. As the plaintiffs have failed to show that PW1's evidence falls within provisos (b) or (c), PW1's oral evidence is inadmissible under the parol evidence rule in s 92 of the Evidence Act 1950 (see also *Keng Huat Film Company Sdn Bhd v Makhanlall (Properties) Pte Ltd* [1984] 1 MLJ 243; [1983] CLJ (Rep) 186 (FC) at p 193).

[16] What remains to be determined is whether on its true construction cl 13 admits of the interpretation advanced by the plaintiffs. When a court is called upon to interpret a contract, it must do so in a manner which best serves the commercial purpose of the contract (see *Loh Wai Lian v SEA Housing Corporation Sdn Bhd* [1987] 2 MLJ 1; [1987] 1 LNS 37). In *Berjaya Times Square Sdn Bhd v M-Concept Sdn Bhd* [2010] 1 CLJ 269 (FC) the Federal Court set down guidelines for the interpretation of a contract. First, a court interpreting a private contract is not confined to the four corners of the document. It is entitled to look at the factual matrix forming the background to the transaction. Second, the factual matrix which forms the background to the transaction includes all material that was reasonably available to the parties. Third, the interpreting court must disregard any part of the background that is declaratory of subjective intent only. Lastly, the court should adopt an objective approach when interpreting a private contract (see *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98; *Bank of Credit and Commerce International SA v Munawar Ali* [2001] 2 WLR 735; *Prenn v Simmonds* [1971] 3 All ER 237, 241 (applied by the former Federal Court in *Keng Huat Film Co Sdn Bhd v Makhanlall (Properties) Pte Ltd* [1984] 1 MLJ 243; [1983] 2 CLJ 187; [1983] CLJ (Rep) 186 (FC); *Attorney General of Belize v Belize Telecom Limited* [2009] UKPC 11 (PC)).

[17] Learned counsel for the plaintiffs submitted that the obligation to give the second plaintiff the first choice of operatorship is still binding on the

defendant as the obligation is a continuing obligation. Does cl 13 point to a continuing obligation on the part of the defendant? It is pertinent to examine cl 13 which is reproduced hereunder:

> 13 The Purchaser (the defendant) shall offer the Vendor (the 2nd plaintiff) first choice for operatorship of the petrol filling and service station to be constructed on the said land in accordance with their usual terms and conditions of the Shell Filling/Service Station Operating Agreement PROVIDED THAT if the Vendor shall fail to accept the Purchaser's said offer for whatever reasons within one (1) month from the date of receipt thereof the offer shall be deemed to have been refused by the Vendor OR if the Vendor is unable to obtain the necessary licence under the Petrol Development Act 1974, or any other licences within … months, the offer would be deemed to have lapsed, and the Purchaser shall then be at liberty to offer the operatorship to any other person. (parenthesis supplied)

[18] Clause 13 explicitly declares that the defendant shall offer the second plaintiff the first option for operatorship of the petrol station to be constructed on the land. This intention crystallised when the second plaintiff exercised its right under the first option in its letter dated 5 September 1985. In accordance with cl 13 the defendant then appointed the first plaintiff as the operator for the petrol station. Subsequently the first plaintiff operated the petrol station commencing from 1986 until 27 October 2006 when the second agreement was terminated. Thus, absent any ambiguity in cl 13 and where the surrounding circumstances do not create any doubt or difficulty as to the proper application of words therein, the court will construe cl 13 according to its plain and ordinary meaning. It was clearly the intention of the parties to the SPA that (i) the purchase of the land was for the purpose of constructing a petrol station thereon; and (ii) the second plaintiff offered the first option for operatorship of the petrol station. There is nothing in cl 13 to intimate that the option was indefinite or that the defendant's obligation to offer to the second plaintiff first choice for operatorship is a continuing offer. It is inconceivable how cl 13 can be admitted to the meaning ascribed by the plaintiffs.

[19] By reason of the foregoing the court finds that the defendant's obligations under the SPA has already been performed when it appointed the first plaintiff as its operator for the petrol station. As such the obligation no longer subsists. In the premises the question is answered in the negative. The question of whether the defendant has breached the said obligation is therefore a non-issue.

Whether the first plaintiff breached the second agreement? If so, whether the termination of the second agreement by the defendant is valid in law

[20] According to the show cause letter the breaches complained of under cl 31.1 were that:

A ... you have changed your business constitution without our prior written consent. Your previous director, En Zahery bin Jusoh (PW1), has sold 100,000 of his shares and has resigned his directorship with effect in March 2005. (parenthesis added)

B **[21]** For completeness, cl 31.1 is reproduced below:

31.1 In the event the Licensee, being a firm or company, seeks to change its name or constitution, it shall first seek the Company's written consent. If the Company does not consent to the proposed change, it may terminate this Agreement.

C

[22] In short, the defendant's allegations is that the first plaintiff changed its constitution when (i) PW1 sold 100,000 shares in the first plaintiff company; and (ii) PW1 resigned as a director of the first plaintiff company in March 2006 without the defendant's prior written consent.

D

[23] On the allegation (i) above PW1 denied selling 100,000 shares in the first plaintiff company. The 100,000 shares are shares owned or held by PW1 in another company Mega Equity Sdn Bhd ('MESB'). MESB is a shareholder of Cahaya Machineries Sdn Bhd which is in turn a shareholder of the first plaintiff company. Therefore MESB is a related company of the first plaintiff company. PW1 only disposed of his 100,000 shares in MESB. As such the defendant's prior written consent it is not necessary for the disposed of the said shares.

E

F

[24] As for allegation (ii) above, it was contended for the plaintiff that cl 31.1 does not include a change of directorship or shareholding in the first plaintiff company. The word 'constitution' is not defined in the second agreement. The word constitution refers to the memorandum and articles ('M&A') of a company (Part III (Constitution of the Companies) Companies Act 1965; *Soo Boon Siong @ Saw Boon Siong v Saw Fatt Seong and Saw Hock Seang* (as estate representative *Soo Boon Kooi @ Saw Boon Kooy (deceased)) & Ors* [2008] 1 MLJ 27 (CA) at p 41; *Baldev Singh v Mahima Singh & Ors* [1974] 2 MLJ 206 at p 208). The change in the constitution refers to any amendment to the M& A of the first plaintiff company. Therefore, the change in the directorship or disposal of shares in the first plaintiff company does not amount to a change in the constitution of the first plaintiff company. In the same vein the plaintiffs also contended that as the term 'change in the constitution' is unclear, the ambiguity should be resolved in favour of the plaintiffs under the contra proferentum rule of construction.

G

H

I

[25] The plaintiffs further contended that according to the termination letter, the second agreement was terminated under cl 22 on the grounds that the first plaintiff breached the terms of the PDA licence which has placed the

operation of the petrol station under jeopardy. This contradicts DW1's evidence that the termination letter was issued by reason of the change in the first plaintiff company's constitution without the defendant's prior consent in breach of cl 31.1.

[26] The fact that PW1 resigned as director on 2 March 2005 without informing the defendant is not disputed. The issue is this — whether, on a true construction of cl 31.1, the word 'constitution' means the shareholding and board of directors in the first plaintiff company.

[27] The defendant contends that the first plaintiff and its ultimate holding company MESB is a single economic unit (*Visvanathan Perumal & 2 Ors v Mona Industries Malaysia Sdn Bhd & Anor* [2004] 1 LNS 35). The general rule that intention is to be inferred from the words alone cannot apply as the phrase 'seeks to change its name or constitution' may give rise to ambiguity. Instead, evidence of surrounding circumstances should be considered, such as the factual background at or before the date of the second agreement (*Sri Alam Sdn Bhd v Newacres Sdn Bhd* [1994] 1 CLJ 302; *Chooi Siew Cheong v Lucky Height Development Sdn Bhd & Anor* [1995] 2 CLJ 11 (FC); *Keng Huat Film Co Sdn Bhd v Makhanlall (Properties) Pte Ltd*). Learned counsel for the defendant submitted that due to the following circumstances the words 'seeks to change its name or constitution' means a change in the directorship or shareholder of the first plaintiff company:

(a) the second agreement is not the first licence agreement between the first plaintiff and the defendant. The first plaintiff entered into numerous licence agreements with the defendant to operate the petrol station since 1985. The second agreement supersedes the previous licence agreements which have expired.

(b) PW1 is an experienced businessman with vast experience in operating petrol stations. PW1 was appointed as a director of the first plaintiff company since 10 August 1985. PW1 is fully aware of the conditions imposed by the Ministry of Domestic Trade and Consumer Affairs ('the Ministry') for the issuance of the annual PDA licence to any retailer.

(c) both PW1 and DW1 are aware that one of the conditions imposed by the Ministry for the issuance of the annual PDA licence is that consent of the Ministry must be obtained before any changes is made to the structure of the company whether in respect of the equity, board of directors, business address, ownership, supplier and so on.

(d) DW1 said that cl 31.1 must be aligned with the PDA requirement because it is a government requirement that any change in the

constitution must have their approval.

FINDINGS OF THE COURT

[28] The plaintiff's contention that the meaning of the word 'constitution' ought to be resolved in their favour is based on one of the canons of construction of written contracts that any ambiguity is resolved contra proferentum. This means that the word 'constitution' should be taken to bear the meaning ascribed to by the plaintiffs — M & A of a company. However, this principle cannot be pressed too far; nor do they oust the principle that where wording is susceptible of more than one meaning regard may be had to the circumstances surrounding the execution of the documents as an aid to construction. In *Coghlan v SH Lock (Australia) Ltd* (1987) 3 BCC 183 PC Lord Oliver said:

> At the outset (counsel) has reminded Their Lordships of certain well-known principles of construction in relation to guarantees. Such a document falls to be construed strictly; it is to be read contra proferentum; and, in case of ambiguity, it is to be construed in favour of the surety. But these principles do not, of course, mean that where parties to such a document have deliberately chosen to adopt wording of the widest possible import that wording is to be ignored. Nor do they oust the principle that where wording is susceptible of more than one meaning regard may be had to the circumstances surrounding the execution of the document as an aid to construction.

[29] The word 'constitution' appears within the context of cl 31.1 as 'seeks to change its name or constitution'. The word 'constitution' is not defined in the second agreement. It is susceptible of more than one meaning. Adverting to the guidelines laid down by the Federal Court in *Berjaya Times Square Sdn Bhd v M-Concept Sdn Bhd*, cl 31.1 should be interpreted in a manner which best serves the commercial purpose of the second agreement. The second agreement is predicated on the licensee obtaining a PDA licence in order for the contract to be performed. It is not disputed that one of the express conditions of a PDA licence is that the Ministry's consent must be obtained before there is any change in the board of directors or shareholding of the first plaintiff company. Looking at cl 31.1 objectively, the court cannot see how it can be said that the word 'constitution' refers to the M& A of a company. There is nothing in the conditions for the issuance of a PDA licence pertaining to the M & A of a company. On the contrary, this condition is explicitly stated as one of the 'Syarat-Syarat Lesen PDA' as follows:

> 3 Mendapat kelulusan KPDN dan HEP sebelum membuat sebarang pindaan mana-mana bahagian atau melakukan sebarang perubahan di dalam struktur syarikat sama ada dari segi ekuiti, lembaga pengarah, alamat perniagaan, hak milik, pembekal dan sebagainya.

PW1 was well aware of this condition even though he said that in practice the Ministry never took any action in spite of a breach of the condition. It is pertinent to consider DW1's explanation that cl 31.1 was aligned with the PDA requirement because it is a government requirement that any change in the company's structure must have their approval. As such it was incumbent upon the defendant to ensure that the requirements were not breached by the licensees. In the premises the word 'constitution' must be taken to mean the structure of the first plaintiff company including its shareholding and board of directors.

[30] Reverting to the allegation (i) in the show cause letter. In *Visvanathan a/l Perumal*, the plaintiff's claim was for the balance of transportation charges for ferrying workers to and from the first defendant's factories in Melaka. The issue was whether the second defendant being the ultimate holding company of the first defendant is liable to pay the debts of the first defendant. The High Court found that the second defendant controls and manages the first defendant and the two companies were to all intents and purposes a single economic unit. On that basis the High Court lifted the corporate veil and held the second defendant liable for the debts of the first defendant. That case is, however, distinguishable on the facts as the issue in this case is whether the sale of the shares in MESB amounted to the sale of shares in the first plaintiff company.

[31] Even if MESB and the first plaintiff are considered as a single economic unit, is it reasonable to infer that the disposal of shares in MESB is tantamount to the disposal of shares of the first plaintiff for the purposes of cl 31.1. MESB remained a shareholder of the first plaintiff company. The only difference was that the shareholding of MESB changed after PW1 disposed the 200,000 shares. Therefore, to all intent and purposes, there was no change in the shareholding of the first plaintiff company. To hold otherwise would be unreasonable and unwarranted in the circumstances. Accordingly, the court finds that allegation (i) is unfounded.

[32] As for allegation (ii), it is not disputed that the first plaintiff resigned his directorship in March 2005 without obtaining the defendant's prior written consent. In failing to obtain the defendant's prior written consent the first plaintiff has committed a breach of cl 31.1.

[33] Notwithstanding the breach of allegation (ii), is the termination of the second agreement valid in law? According to the termination letter, the defendant exercised its rights of termination under cl 22 and gave 30 days notice of termination. Clause 22 is as follows:

> Either party may at its discretion and without assigning any reason whatsoever terminate this Agreement by giving thirty (30) days' notice in writing to the other or in lieu of such notice by paying a sum equivalent to the difference between the

A wholesale and retail prices on the sale of motor fuels only made by the Licensee from the Station during a period of thirty (30) days immediately preceding such termination. The termination of this Agreement under this Clause shall be without prejudice to any rights or remedies either party may have against the other for any antecedent breach of this Agreement.

B

[34] The plaintiff's contention that the termination letter refers to other alleged breaches under cl 22 is misconceived. The termination letter expressly referred to the show cause letter and to the first plaintiff's response dated 14 August 2006. It is explicitly stipulated in cl 31.1 that the defendant may C terminate the second agreement in the event of breach. As PW1's resignation as a director without the defendant's prior written consent is in breach of cl 31.1, the defendant was entitled to terminate the second agreement in accordance with cl 22. For the foregoing reasons the court finds that the termination of the second agreement is lawful.

D

Whether the first and second plaintiffs have a legitimate expectation that the defendant will renew the operation of the petrol station so long as the PDA licence is renewed by the first plaintiff

E

[35] The plaintiffs' contention is that the first plaintiff is entitled in law to have the legitimate expectation that the defendant will continue to renew the agreement provided that the conditions pertaining to the PDA licence and all other relevant licences are obtained by the first plaintiff. In support of their F proposition learned counsel for the plaintiffs cited the following authorities: *Council of Civil Service Unions v Minister for Civil Service* [1985] AC 374; *R v Metropolitan Borough Council* [1976] 3 All ER 452; *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan tanggungan* [1999] 3 MLJ 1; [1999] 3 CLJ 65; *Law Pang Ching & Ors v Tawau* G *Municipal Council* [2009] 3 MLJ 452; [2010] 2 CLJ 821. The doctrine has been raised in private law arrangements and was accepted by the courts (*Tuan Haji Ismail v Leong Hup Holdings Bhd and another appeals* [1996] 1 MLJ 661; [1996] 1 CLJ 393 (CA); *Sim Yong Kim v Evenstar Investments Pte Ltd* [2006] 3 SLR(R) 827; [2006] SGCA 23; *Re Saul Defendant Harrison & Sons plc* [1995] H 1 BCLC 14)

[36] In reply the defendant contends that the doctrine of legitimate expectation only applies to public law. It has no room for operation in the private law of contract; the SPA and the second agreement are private contracts. I In addition, the SPA and the second agreement are two separate and distinct agreements; the SPA entered between the defendant and the second plaintiff whilst the second agreement is between the defendant and the first plaintiff.

[37] The historical background relating to the doctrine of legitimate expectation has been clearly set out by the Court of Appeal in law *Law Pang Ching & Ors v Tawau Municipal Council* [2009] 3 MLJ 452; [2010] 2 CLJ 821, 836–838 . Suffice it to say that as a general rule the doctrine is an equitable doctrine under development in public law. Is the doctrine applicable to a private law situation? Recognition of this doctrine appears to have been accorded in private law situation within the context of shareholder's rights in a private company involving elements of quasi-partnership, other personal relationship or personal dealings of some kind between the party seeking to exercise the legal right and the party seeking to restrain such exercise, such as will affect the conscience of the former.

[38] In *Tuan Haji Ismail v Leong Hup Holdings Bhd and other appeals* , Leong Hup contended that by virtue of certain representations made by the first three respondents and certain alleged agreements between it and KFC Holdings (M) Bhd ('KFCM') and between the Lau Brothers and the first respondents Leong Hup had a legitimate expectation to remain on the KFCM Board without any interference from any of the respondents. In reply the respondents contended that because KFCM was a public listed company, the alleged agreements and representations were irrelevant because a group of shareholders whether acting for themselves or purportedly on behalf of the company could not 'contract out' of s 128 of the Companies Act which conferred a statutory right to all its shareholders to remove directors. The primary issues that arose were: (i) Whether legitimate expectation could arise on the said allegations? and (2) If so, whether it was binding on all the other shareholders of KFCM, or put in another way, whether s 128 of the Companies Act overrode s 181 thereof. The Court of Appeal considered the problems associated with legitimate expectation in public companies. In larger private and public companies the interests of shareholders are likely to be quite different for those of shareholders in quasi-partnership and considerably more restricted. In larger companies there is usually no underlying personal relationship, employment is rarely an issue and the shareholders are more interested in such matters as dividend yield and capital appreciation than involvement in the day-to-day running of the company. If they become dissatisfied, especially if it is a public company, they can sell their shares and withdraw from the company; the members rarely have expectations beyond their strict legal rights as provided by the articles. In *Ebrahimi v Westbourne Galleries* [1973] AC 360 even though there was no express agreement about participation, the legitimate expectation to participate arose because in the circumstances of that case the relationship was deemed to be a quasi-partnership with a fundamental understanding as to participation in the conduct of the business, an understanding, to which all the shareholders were privy. In the result the petition was struck out as the Court of Appeal found that there was nothing in the petition from which it can safely be

A inferred that there was any agreement binding the shareholders of KFCM from casting their votes as they thought fit (doctrine was accepted in the context of shareholders in private companies).

B **[39]** In *Sim Yong Kim v Evenstar Investments Pte Limited*, the appellant was the sole minority shareholder while his older brother Mike was the sole majority shareholder in the company. The Singapore Court of Appeal found that the brothers' partnership in the company was premised throughout on the fundamental understanding that their association would only continue as long as the appellant was a willing party. The appellant had a legitimate expectation C of being bought out by Mike on reasonable terms if he sought to be bought out. The unfairness flowing from Mike's breach of the promise to let the appellant pull out left the appellant trapped in the company and placed him at Mike's mercy. Similarly, in *Re Saul Defendant Harrison & Sons plc*, the Court of Appeal recognised that shareholders in a family-run company could have a legitimate D expectation arising from the personal relationship between a shareholder and those who control the company to say that it would in certain circumstances be unfair for them to exercise a power conferred by the articles upon the board or the company in general meeting.

E **[40]** As can be seen from the cases cited by the plaintiff the doctrine of legitimate expectation may arise in situations other than in the realm of public law. However, the cases are distinguishable as they relate particularly to the question of a shareholder's rights in a private company and not to a party's F rights under a private contract situation. In the premises the cases are of no aid to the plaintiffs' contention. There is therefore no basis upon which the plaintiffs can lay claim to a legitimate expectation that the defendant will renew the operation of the petrol station so long as the PDA licence is renewed by the first plaintiff. The remaining cases cited by the plaintiffs – *Council of Civil* G *Service Unions v Minister for Civil Service*, *R v Metropolitan Borough Council*, *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan tanggungan*, *Law Pang Ching & Ors v Tawau Municipal Council*, relates to judicial review and certiorari and the exercise of power of public authorities. They are also distinguishable and are of no aid to the H plaintiffs. In the premises the question is answered in the negative.

[41] In consequence of the above findings the plaintiffs' claim is dismissed with costs. The defendant's counterclaim is allowed in prayers (b), (c), (d), (e)

I

with damages to be assessed by the deputy registrar together with interest at 8% on the damages assessed calculated from 27 February 2007 until satisfaction and costs.

Plaintiffs' claim dismissed with costs and defendant's counterclaim in prayers (b), (c), (d) and (e) allowed with costs.

Reported by Ashok Kumar